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No. 07-560

FILED
NOV 2 8 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

LOWE EXCAVATING CO.,

Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DALE D. PIERSON*
ELIZABETH A. LAROSE
IUOE, LOCAL 150, AFL-CIO
Legal Department
6140 Joliet Road
Countryside, IL 60525
Ph. 708/579-6663
Fx. 708/588-1647

R. MARK GUMMERSON
GUMMERSON & RAUSCH
101 South Benton Street, Suite 201
Woodstock, IL 60098
Ph. 815/337-7700
Fx. 815/337-7990

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether Petitioner has presented this Court with any compelling reason for review?

2. Whether Petitioner demonstrated that the Illinois Supreme Court erred in finding the punitive damages awarded by the Appellate Court to be unconstitutional?

3. Whether Petitioner established the existence of a "small damages" exception to the Constitutional analysis of punitive damages awards for which it qualifies?

PARTIES BELOW

The parties in the proceedings before the Illinois Supreme Court were Appellant, Cross-Appellee International Union of Operating Engineers, Local 150, AFL-CIO and Appellee, Cross-Appellant Lowe Excavating Co., Inc.

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JURISDICTION

Respondent's agree that Petitioner's statement of jurisdiction is correct.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent's agree with Petitioner's citation to the Fourteenth Amendment, Section 1 of the Constitution which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Respondent does not agree that the Seventh or Eighth Amendments to the United States Constitution should play any part in this appeal.

COUNTER STATEMENT OF THE CASE

A. Procedural History.

In *Lowe Excavating Co. v. International Union of Operating Engineers, Local 150, AFL-CIO*, 327 Ill. App. 3d 711, 725, 765 N.E.2d 21 (2nd Dist. 2002) ("*Lowe II*"), the Illinois Appellate Court affirmed an award of $4,680 in actual damages for Plaintiff Lowe Excavating, and remanded the case to the Circuit Court to consider evidence of Lowe's attorneys' fees "if it decided to award punitive damages." On remand, the Circuit Court awarded Lowe $325,000 in punitive damages, later increased to $525,000. On appeal, the Appellate Court affirmed the award of punitive damages, but modified it by returning to the original $325,000 awarded by the Circuit Court. *Lowe Excavating Co. v. International Union of Operating Engineers, Local 150, AFL-CIO*, 358 Ill. App. 3d 1034 (2nd Dist. 2005) ("*Lowe III*").

In *International Union of Operating Engineers, Local 150 v. Lowe Excavating Company*, 225 Ill. 2d 456 (2006), the Illinois Supreme Court found the award of $325,000 in punitive damages was unconstitutional under the decisions of the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003). In *State Farm*, the Court explained that the "Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." 538 U.S. at

418. The Court added that while there was no "bright line ratio," which a punitive damage award could not exceed, "single-digit multipliers are more likely to comport with due process," 538 U.S. at 424; while "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.* at 425. Indeed, "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." *Id.*

B. Statement of the Facts.

Respondent International Union of Operating Engineers, Local 150, AFL-CIO is an unincorporated voluntary association and labor organization representing heavy equipment operators and other employees in the construction, excavating and material production industries (C. II 000392). Colin "Bob" Darling is a business agent employed by the Union (R. V 000531; C. II 000392).

Petitioner Lowe Excavating Co. ("Lowe") is an Illinois corporation doing business in Illinois as an excavation contractor (R. VII 000989). Its principal office is located in Cary, McHenry County, Illinois (R. VII 000989). Marshall Lowe is the owner, president and chief executive of the Company (R. VII 000988). According to Lowe, from the time the Company first went into business in 1970, until the mid-1980s, its wage and benefit package totaled "something less" than that earned by Local 150 operating engineers (R. XI 001343-1344).

In the latter part of 1987, Lowe Excavating had at least two construction projects in progress (R. VII 000870-871): Ballashire Hall and Canterbury Place (R. VII 000870). Canterbury Place was a planned retirement community (R. VII 000869). The Ballashire Hall Project involved the construction of a nursing home (R. VII 000870). Marshall Lowe readily conceded that prior to the Ballashire Hall Project begun in 1988, he did not pay his employees prevailing wages or wages and benefits standard to the area (R. XI 001381). Lowe likewise acknowledged that when he began the Ballashire Hall portion of the Canterbury Place Project, it was the very first prevailing wage project his Company had ever undertaken (R. XI 001344-1345).

On February 15, 1988, Local 150 began picketing the Company at the Canterbury Place jobsite (R. V 000550-551, R.V 000556, R. V 000878). Soon after the Union began picketing the Company at the Canterbury site, Brad Brei, President of FAMCO, requested that Lowe Excavating leave the job (R. VII 000882-883, R. XI 001317-1318; C. I 00008).

In April 1988, the Company agreed to have its payroll books and records audited by the Union's certified public accountants, for the first quarter of 1988 (R. XI 001395-1396, R. IX 001223). The audit findings revealed that the Company's fringe benefit costs were substandard.

On August 15, 1988, Marshall Lowe signed a collective bargaining agreement with the Congress of Independent Unions ("CIU"), a non AFL-CIO affiliate which was purportedly retroactive to April 15, 1988 (R. VI 000654-656). A comparison of the wage rates between the CIU and Local 150 contracts shows that the periodic wage increase for employees covered by the CIU contract lagged ten months behind the wages of the employees covered by the Local 150 contract (Union Trial Ex. 1 at 4; Union Trial Ex. 2; R. V 000611, R. VI 000684-689, R. VI 000695-700, R. VI 000833). It is undisputed that for the period of June 1, 1988 to April 15, 1989, the Company paid wage rates below that of Local 150 (R. VI 000695-696, R. VI 000700).

In September 1988, the Company resumed work at the Canterbury Place project (R. VII 000915-916). It is uncontested that the wage and benefit rates paid Lowe employees under the CIU contract at that time were below the rates paid to Local 150 operators (R. VI 000695-696, R. VI 000700).

On October 19, 2000, the Circuit Court of the Nineteenth Judicial Circuit, McHenry County, Illinois, found in favor of Defendant International Union of Operating Engineers, Local 150, and against Plaintiff Lowe Excavating Company on its claims for defamation and tortious interference (C. III 000741-757). On January 11, 2002, the Appellate Court reversed in part and remanded the case to the Circuit Court, finding that Defendant Local 150 defamed the

Company and affirming an award of $4,680 in compensatory damages. *Lowe II*, 327 Ill. App. 3d at 724. In that opinion, the Court directed the Trial Court to consider "evidence of Lowe's attorneys' fees," "if [the Trial Court] decides to award punitive damages." *Id.* at 725.

On December 16, 2002, Lowe filed its "Motion for Prejudgment Interest and Post-Judgment Interest" (A. 1). On April 3, 2003, the Court denied Lowe's Motion for Prejudgment Interest, but granted the Motion for Post-Judgment Interest, and expressly stated that "Judgment is entered in favor of Plaintiff in the amount of $4,680 and against Defendant *nunc pro tunc* as of October 19, 2000." After a full hearing into Lowe's Motion for Punitive Damages, on January 12, 2004, the Court awarded Lowe $325,000 in punitive damages (C. VI 001643).

On or about January 20, 2004, Lowe filed a Motion for Partial Reconsideration and Modification of Order on Punitive Damages (C. VI 001647). Meanwhile, on February 8, 2004, Local 150 filed its Notice of Appeal of the January 12, 2004 Opinion with the Appellate Court. On February 18, 2004, Lowe Excavating filed its Notice of Cross-Appeal of the Order on Punitive Damages entered on January 12, 2004. On February 24, 2004, the Court considered Lowe's Motion and increased the punitive damage award to $525,000. The Court denied Local 150's Motion for Reconsideration of that award on April 16, 2004.

On July 8, 2005, the Illinois Appellate Court affirmed the award of punitive damages, but modified it by reducing it to $325,000. On November 30, 2006, the Illinois Supreme Court likewise affirmed the award of punitive damages to Lowe. The Court added, however, that based upon the principles of *State Farm*, *Gore*, and other controlling case law (225 Ill. 2d at 490-491):

> We hold that a punitive damages award of $325,000 at a ratio of approximately 75 to 1, is unconstitutionally excessive in light of the Union's conduct in the instant case. We find that an award of punitive damages against the Union in the amount of $50,000 for a double-digit ratio of approximately 11 to 1, would be reasonable and constitutional. As our analysis demonstrates, the Union's conduct was minimally reprehensible, and the appellate court's award of punitive damages far exceeded awards given in other cases where the conduct exhibited was much more egregious. Furthermore, Lowe did not present evidence demonstrating that it sustained any injury to its reputation that extended beyond its strained and ultimately reconciled relationship with FAMCO. We cannot presume such damage, as the evidence does not warrant it. Indeed, the evidence shows that Lowe was a non-union company paying less than the prevailing wage from 1969 until 1988. While Lowe's business decisions in this regard have no bearing on the issue before us, it stands to reason that companies that did business with Lowe

were aware of its practices, and remained Lowe customers nonetheless.

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS FAILED TO PRESENT A COMPELLING REASON FOR REVIEW.

The Supreme Court of the United States will only grant a petition for a writ of certiorari for compelling reasons. Sup. Ct. R. 10. This Court will grant certiorari where there are conflicting decisions in the United States Court of Appeals on the same important matter; where a court of appeals has departed or sanctioned the departure from the accepted and usual course of judicial proceedings; where a state court of last resort has issued a decision conflicting with another state court of last resort or with a United States court of appeals; or a state court or United States court of appeals has decided an important question of federal law that should be decided by this Court. Sup. Ct. R. 10; H. W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Harvard University Press, 1991). Review will be granted only in cases presenting "tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country." Chief Justice Fred M. Vinson, Work of the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949) in 69 S. Ct. at v, vi. Lowe does not and cannot demonstrate that its Petition presents any of these compelling reasons.

This Court only considers decisions of a state court of last resort on an important federal question which conflict "with the decision of another state court or of a United States court of appeals" Sup. Ct. R. 10. Here, Lowe asserts no conflict with another state court of last resort. Nor does Lowe claim conflict with the Seventh Circuit. At most, Petitioner argues that the Seventh Circuit decision in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003), was given "no consideration in the Illinois Supreme Court's conclusion" (Petition for Writ of Certiorari, hereinafter "Petition," at 20).

Lowe's assertion is simply inaccurate. The Illinois Supreme Court specifically noted "the observations of the Seventh Circuit set forth in *Mathias*" in making its decision. *Local 150*, 225 Ill. 2d at 489. "With all these principles in mind," the Court said, "we hold that a punitive damages award of $325,000 at a ratio of approximately 75 to 1, is unconstitutionally excessive in light of the Union's conduct in the instant case." *Id.* at 490. Rule 10 specifically states that "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Respondent Local 150 submits that the Illinois Supreme Court both properly stated and applied this Court's teachings in a now well developed line of cases concerning the constitutionality of punitive damages awards. Nothing said by the Illinois Supreme Court deviates from those principles.

II. THE ILLINOIS SUPREME COURT CORRECTLY HELD THAT THE PUNITIVE DAMAGES AWARDED IN THIS CASE WERE UNCONSTITUTIONAL.

A. The Illinois Supreme Court Properly Reviewed the Award of Punitive Damages *De Novo*.

In *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), this Court held that review of the constitutionality of the award of punitive damages is *de novo*. There, the Court of Appeals upheld a $4.5 million punitive damage verdict where only $50,000 had been awarded in compensatory damages. On review, the Court of Appeals concluded that the District Court did not abuse its discretion in declining to reduce the amount. The issue considered by the Supreme Court was "whether the Court of Appeals applied the wrong standard of review in considering the constitutionality of the punitive damages award." *Id.* at 426.

This Court concluded that the less exacting abuse-of-discretion standard was in fact wrong and held that "the constitutional issue merits *de novo* review." *Id.* at 431. There, the Court offered at least three reasons for *de novo* appellate review. First, the precise meeting of certain concepts such as gross excessiveness is fluid and cannot be articulated with precision. *Id.* at 436. Next, such legal rules "acquire content only through application," and it is necessary for appellate courts to maintain control of and clarify legal principles. *Id.* Finally, as these rules acquire

meaningful content through case-by-case application, the appellate courts give them uniformity. *Id.*

Lowe asks this Court to reexamine its decision in *Cooper Industries.*[1] The basis for this assertion is essentially that bench trials are different from jury trials. As Lowe explains (Petition at 27):

> In the case at bar, a bench trial was conducted where the trial judge held hearings that were transcribed and issued a written decision setting forth findings of fact and conclusions of law describing why punitive damages should be awarded and the considerations from the evidence that informed his decision to impose punitive damages and how the amount was essentially arrived at.

The Illinois Supreme Court rejected essentially the same arguments. There the court explained (*Local 150*, 225 Ill. 2d at 469):

> Lowe argues that *Cooper* and *State Farm*, and the cases upon which they relied, do not require that this Court utilize a *de novo*

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[1] Lowe's third question presented is (Petition at ii):

> Whether a trial judge's award of punitive damages based on specific findings of fact after a state court bench trial is subject to the same *de novo* standard of review as awards made by juries under *Cooper Industries* and *Philip Morris* [*v. Williams*, ___ U.S. ___, 127 S. Ct. 1057 (2007)] or an abuse of discretion standard of review for excessive awards as in *Gasparini v. Center for Humanities, Inc.*, 518 U.S. 415, 434-435, 436 (1996).

> standard of review because those cases involved punitive damages awarded by a jury instead of a judge after a bench trial. We find this distinction to be of no consequence. Whether punitive damages were awarded by a judge or a jury has no impact on the reasons articulated in *Cooper* for applying a *de novo* standard, such as unification of precedent and stabilization of the law. Accordingly, we review the constitutional question before us *de novo*.

Lowe's first error in its argument that the constitutionality of punitive damages awards are not reviewed *de novo* is in its assertion that such a standard only applies to jury awards. Nowhere in *Cooper, Gore*, or *Campbell* did the Supreme Court make the distinction between jury and bench trials offered by Lowe here. In fact, in *Cooper*, the Supreme Court expressly compared the "institutional competence of trial judges and appellate judges" in applying the three *Gore* guideposts. Moreover, the actual application of the *Gore* and *Campbell* factors by the courts of appeal most often come up in review of trial judge determinations of post-trial remittitur motions, *see, e.g., Diesel Machinery, Inc. v. B.R. Lee Industries, Inc.*, 418 F.3d 820 (8th Cir. 2005); *Eden Electrical Ltd. v. Amana Company*, 370 F.3d 824 (8th Cir. 2004), or after remand. *See, Planned Parenthood of the Columbia/ Willamette Inc., v. American Coalition of Life Activists*, 422 F.3d 949, 952-953 (9th Cir. 2005). Hence, the appellate courts have made no distinction between jury and bench determinations of punitive damages.

Lowe's next mistake in arguing for a lesser standard of review is in its insistence that punitive damages are a factual determination measured against an abuse of discretion or clearly erroneous standard (Petition at 22-23, 31). In *Cooper*, the Court expressly considered and rejected the notion that the level of punitive damages was a question of fact to be determined by the jury. 532 U.S. at 432, 437 ("Because the jury's award of punitive damages does not constitute a finding of fact," no Seventh Amendment concerns are raised). Relying on its decision in *United States v. Bajakajian*, 524 U.S. 321 (1998), the Court stated that an appellate court review of the excessiveness of a damage award should be "*de novo*" and not for an abuse of discretion. *Cooper Industries*, 532 U.S. at 435.

Finally, the retribution and deterrence purposes behind punitive damages do not involve factual determinations. As the Supreme Court explained in *Cooper Industries*, "a jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation." 532 U.S. at 432. In other words, while an assessment of actual damages is often an objective calculation, punitive damages are measured by policy concerns.

Even assuming the Illinois Supreme Court failed to defer to the trial court on its factual determinations, those findings offer Lowe no support for its punitive damages. The trial court ruled in favor of Local 150 after trial on the merits, entering judgment

for the Union on all counts. *Lowe II,* 327 Ill. App. 3d at 719. As it stated in its "Order on Punitive Damages," punitive damages are justified "because *the Appellate Court* has found that the evidence in the case establishes that the Defendant's actions constituted actual malice" (Lowe Appendix at 70a) (emphasis added). Moreover, the trial court denied Lowe's motion to reopen discovery (C-805, 1324-1325); and denied Lowe's offer of proof of "an affidavit and documents to prove that the Defendant engaged 'in other instances of activities in reckless disregard for the truth since 1988 and in further support to Plaintiff's Motion for Punitive Damages'" (Order on Punitive Damages, Lowe Appendix 68a-73a). The Trial Court conducted no further evidentiary proceedings with respect to the punitive damage claim.

There is, therefore, no need to defer to factual findings of the trial court because it made none in support of Lowe. The Illinois Supreme Court properly reviewed the lower courts' punitive damages awards *de novo.* It found that award unconstitutional and this Court should likewise so find.

B. The Illinois Supreme Court Meticulously Applied the *Gore/Campbell* Guideposts.

In *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003), this

Court held that the imposition of an excessive punitive damages claim by a state court was unconstitutional. There, the Court explained that the "Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." 538 U.S. at 418. Relying on *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Court in *Campbell* noted that it had (538 U.S. at 418):

> instructed courts reviewing punitive damages awards to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Faithfully following these "guideposts," the Illinois Supreme Court held that the award of punitive damages to Lowe was unconstitutionally excessive. Nothing in that decision compels reversal by this Court.

1. The Illinois Supreme Court correctly Found that Local 150's Conduct Was Not Sufficiently Reprehensible Under the *Gore/Campbell* Guideposts to Justify the Appellate Court Award.

Under *Gore*, "the most important indicium of the reasonableness of a punitive damages award is the

degree of reprehensibility of the defendant's conduct." 517 U.S. at 575. To determine whether a defendant's conduct is reprehensible, the Supreme Court directed courts to consider whether (*Campbell*, 538 U.S. at 419, *citing Gore*, 517 U.S. at 576-577):

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

As the Illinois Supreme court observed, "Lowe concedes that the Union's conduct created a harm that was economic rather than physical, and that the Union's conduct did not evince a reckless disregard or indifference to the health and safety of others." *Local 150*, 225 Ill. 2d at 471-472. Lowe's failure to satisfy either of the first two elements of the reprehensibility guideposts should not be underestimated.

As the Court explained (in *Campbell*, 538 U.S. at 575-576) (internal quotes and citations omitted):

> This principle reflects the accepted view that some wrongs are more blameworthy than others. Thus, we have said that non-violent crimes are less serious than crimes marked by violence or the threat of violence . . .

Those Courts to have considered the *Gore/Campbell* factors have concluded that physical injury is the

most significant of the reprehensibility factors. Hence, physical harm is "highly reprehensible," *Disorbo v. Hoy*, 343 F.3d 172, 187 (2d Cir. 2003) (police brutality generally found highly reprehensible); while the absence of physical injury usually justifies remittitur. *Fabri v. United Techs International, Inc.*, 387 F.3d 109, 125-126 (2d Cir. 2004); *Parrish v. Solecito*, 280 F. Supp. 2d 145, 163 (S.D. N.Y. 2003) (punitive damages reduced from $500,000 to $50,000 where no physical injury and compensatory damages only $15,000).

The second of the reprehensibility factors set out by the Supreme Court in *Campbell* requires reviewing courts to determine whether "the tortious conduct evinced an indifference to or reckless disregard of the health or safety of others." 538 U.S. at 419. Local 150's fight with Lowe was a private, garden variety labor dispute. The absence of an impact on others thus weighed against the reprehensibility finding.

Nor did the Illinois Supreme Court agree with the Appellate Court that Lowe met the "financial vulnerability element of the reprehensibility analysis." As the Illinois Supreme Court stated (*Local 150*, 225 Ill. 2d at 472):

> Contrary to Lowe's contentions and the appellate court's findings, we conclude that the record in this case is devoid of evidence demonstrating that Lowe was financially vulnerable. Lowe claims that the record shows that it was forced to "engage in odd jobs" after the picketing. However, the portion of the record

> Lowe cites merely demonstrates that, some four to six years after the Ballashire Hall Project, FAMCO contacted Lowe to perform snow removal work. Lowe cites to nothing in the record indicating that it was required to do such work to "stay afloat," as it now contends.
>
> Further, the fact that Lowe is a "small business" does not, by itself, prove financial vulnerability. While we agree with the Appellate Court that small businesses often rely on reputation to maintain and attract customers, the evidence presented in this case demonstrated that Lowe temporarily lost only one customer, FAMCO, as a result of the Union's conduct. The evidence also demonstrated that Lowe operated as a non-union company paying less than the prevailing wage rate for the area without incident from 1969 until 1988 when the Union picketed the Ballashire Hall site. There is no evidence that Lowe lost any other business as a result of the Union's conduct. Moreover, the only financial loss proven was the $4,680 in lost profits stemming from the Ballashire Hall Project. Lowe provided no other financial information which would demonstrate its vulnerability.

Nor did the Illinois Supreme Court agree with the Illinois Appellate Court on the question of whether the Union's conduct was repeated. The Illinois Supreme Court pointed out that "the repeated conduct factor of the reprehensibility test is grounded in the

Supreme Court's opinion in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1" (1991). *Local 150*, 225 Ill. 2d at 476. In *Haslip*, this Court stated that reprehensibility was in part measured by "the duration of that conduct . . . and the existence and frequency of similar past conduct." *Id.*, *quoting* 499 U.S. at 21.[2] After reviewing relevant case law, the Illinois Supreme Court concluded that although the Union's conduct was repeated on at least one occasion, "there is no evidence before this Court demonstrating that the Union falsely picketed Lowe, or anyone else, as a matter of course." *Local 150*, 225 Ill. 2d at 480. Hence there was no pattern of misconduct which typified recidivists in other cases, leading the Illinois Supreme Court to give this factor "little weight in our overall assessment of reprehensibility." *Id.*

Finally, the Illinois Supreme Court found that the Union's conduct was intentional.[3] Nevertheless,

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[2] Lowe claims to have identified another incident of false picketing some ten years after the events giving rise to the claims here (Petition at 18). The Illinois Courts below uniformly refused to consider the belated proffer of affidavit evidence of *subsequent* conduct. This Court should not either. Lowe's reliance on the Kinney affidavit to establish alleged subsequent misconduct in support of its punitive damage claim also runs afoul of this Court's more recent decision in *Philip Morris v. Williams*, ___ U.S. ___, 127 S. Ct. 1057, 1063 (2007) ("the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . ").

[3] The Union stands by the trial court's original determination that Lowe did not pay area standard wages and benefits, and that its picketing was therefore not false. Although the

(Continued on following page)

the Court concluded that this determination was the single factor to support a finding of reprehensibility. *Local 150*, 225 Ill. 2d at 483.

As the Illinois Supreme Court recognized, Lowe Excavating is a corporation, not a human being. It can suffer no hurt feelings or emotional distress. To the extent it can suffer an injury to its business reputation, that injury is measurable in lost revenues and/or profits. The Company offered evidence of neither. Such a showing is required both by the rules governing defamation claims brought in the context of a labor dispute as articulated in *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), and the *Gore/ Campbell* guideposts. *Cf.*, *Routh Wrecker Service, Inc. v. Washington*, 335 Ark. 232, 980 S.W. 2d 240 (1998) (punitive damage ratio of 75-to-1 constitutionally permissible where plaintiff suffered humiliation as a result of abuse of process); *Deters v. Equifax Credit Information Services, Inc.*, 202 F.3d 1262 (10th Cir. 2000) (punitive damage award in 59-to-1 ratio permissible because plaintiff's sexual harassment damages "primarily personal"); *Jones v. Rent-A-Center, Inc.*, 281 F. Supp. 2d 1277 (D. Kan. 2003) (punitive damage ratio of 29-to-1 permissible where sex harassment damages primarily personal and therefore difficult to quantify). Inasmuch as the Company received all the actual damages which it proved, it is

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Appellate Court found that the Union "should have known" that its picket signs were false – suggesting a finding of negligence – the Illinois Supreme Court rejected this argument as well. *Local 150*, 225 Ill. 2d at 482-483.

not up to the courts to make up for Lowe's bad judgment through an enhanced punitive damages award.

2. The Disparity Between the Actual Harm Suffered by Lowe and the Punitive Damages Awarded Alone Rendered The Award Unreasonable.

Based on the evidence at trial, the trial court found and the Illinois Appellate Court approved a judgment against Local 150 of actual compensatory damages in the amount of $4,680. Despite this relatively modest amount of actual damages, the appellate court affirmed an award of punitive damages of $325,000. Such an amount was plainly unconstitutional under *Gore* and *Campbell*. In *Campbell*, this Court declined to establish a "bright line ratio which a punitive damages award cannot exceed." 538 U.S. at 424. The Court then stated (*id.*) (citations omitted):

> Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500-to-1, or in this case, of 145-to-1.

Had the trial court awarded Lowe punitive damages in the 4-to-1 ratio of *Gore* – $18,720 – that award would likely be reasonable. But the trial court's $525,000 punitive damage award to Lowe required the use of a *triple-digit* multiplier, over 100 times the amount of actual damages awarded. In reducing that

award, the appellate court explained that a triple-digit ratio (115 to 1) was "exceedingly disproportionate." *Lowe III*, 358 Ill. App. 3d at 1044. However, the Court went on to conclude that a "double-digit" ratio of 75-to-1 was "constitutionally acceptable." *Id.* at 1045.

The Illinois Supreme Court properly found this conclusion in error. As the Court explained (*Local 150*, 225 Ill. 2d at 487):

> The Union's conduct in the instant case is not comparable to the conduct of the Defendants in *Routh, Deters* and *Jones*. Here, Lowe did not suffer a physical or emotional injury, and the injury sustained was not of a personal nature, as a corporation cannot be personally affronted. Lowe's injury cannot be compared to the humiliation suffered by individuals who endure sexual harassment in the workplace, and is also not comparable to the injury sustained by an individual who is arrested at his workplace for a crime he did not commit, handcuffed, and placed in a cell. While ratios ranging from 75 to 1 to 29 to 1 may have been appropriate under those circumstances, we cannot conclude that a ratio in that range is appropriate here where the Union's conduct was much less egregious.

This Court's admonition in *Campbell* bears repeating: "An award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." 538 U.S. at 425. It follows, therefore, that *any* double-digit multiplier – over twice

the multiplier that "might be close" – must necessarily be over that line. As such, the Illinois Supreme Court properly found the 75-to-1 multiplier unreasonable and unconstitutional.[4]

III. THERE IS NO SMALL DAMAGE CASE EXCEPTION TO THIS COURT'S CONSTITUTIONAL ANALYSIS OF PUNITIVE DAMAGES AWARDS.

In seeking to carve out an exception for "small damage" cases, Lowe offers its failure to prove a significant economic injury as a basis for an enhanced punitive damage award. It suggests that in order to be "made whole," punitive damages are necessary (Petition at 20). The simple fact remains that as the Illinois Supreme Court observed, "the only financial loss proven was the $4,680 in lost profits stemming from the Ballashire Hall Project." *Local 150*, 225 Ill. 2d at 473. There is no evidence that Lowe lost any other business as a result of Local 150's conduct and the one customer it did lose, FAMCO, it lost only "temporarily." *Id.* at 472-473.

At no point has this Court recognized a "small damage" exception to its constitutional analysis of punitive damage awards. In *State Farm*, the Court

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[4] The Illinois Supreme Court did not consider the third *Gore/Campbell* guidepost because there is no legislative judgment in Illinois on this issue. *Local 150*, 225 Ill. 2d at 489. Lowe apparently does not disagree with this element of the analysis.

did acknowledge that where "a particularly egregious act has resulted in only a small amount of economic damages, ratios greater than those previously upheld may comport with due process." 538 U.S. at 425. But that is not this case. Nor is this a case where the injury is "hard to detect" or the monetary value of non-economic harm "difficult to determine." *Gore*, 517 U.S. at 582. Lowe's injury was hardly hard to detect. The company was picketed in broad daylight, which led to the temporary loss of the Ballashire Hall Project. Nor did it suffer a difficult to determine non-economic harm. Lowe's harm was economic – calculated precisely at $4,680 in lost profits. It proved no non-economic harm despite ample opportunity to do so. To the extent Lowe's damages were small, it is because $4,680 is all the company lost. Punitive damages cannot be awarded as compensatory damages or attorneys fees in disguise.

CONCLUSION

For all the foregoing reasons, Respondent Local 150 respectfully requests that this Court deny Petitioner Lowe's Petition for Writ of Certiorari in its entirety. Petitioner has failed to identify any compelling reasons for review, and the Illinois Supreme Court faithfully applied this Court's "guideposts" in measuring the punitive damages awarded here.

Nor has the Petitioner established the existence of a "small damages" exception, or its applicability here.

Dated: November 28, 2007

Respectfully submitted,

DALE D. PIERSON
Counsel of Record
ELIZABETH A. LAROSE
IUOE, LOCAL 150, AFL-CIO
Legal Department
6140 Joliet Road
Countryside, IL 60525
Ph. 708/579-6663
Fx. 708/558-1647

R. MARK GUMMERSON
GUMMERSON & RAUSCH
101 South Benton Street,
Suite 201
Woodstock, IL 60098
Ph. 815/337-7700
Fx. 815/337-7990